

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 774 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

VIJAY BAHADUR SHITALDIN KORI

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Appearance:

MR BY MANKAD, ADDL PUBLIC PROSECUTOR for appellant

MR JM PANCHAL for Respondent

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CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 12/10/98

ORAL JUDGEMENT

State, being aggrieved by an order of acquittal recorded by Metropolitan Magistrate, Court No. 9, Ahmedabad on 31.1.1991 in Criminal Case No. 1596/89, has preferred this appeal. The accused was tried for offences punishable under sections 381 and 204 of the Indian Penal Code.

2. Ajaykumar Dwarakadas Patel, PW. 1, lodged a complaint before the police, vide Exh. 7 interalia alleging that on 6.5.1989, after making payment to several persons working on different sites, kept the remaining cash of Rs.1,20,000/- in a brief case and he kept the same in the safe situated in the office and after locking the same, went in the evening to his

residence. At the relevant time, other persons were working. In the morning, at about 9.30 am., he received an intimation from Naranpura Zonal Office that the safe is lying open and the brief case is lying below the table. It was informed that theft is committed. On receiving this information, he immediately reached the office and he found that the safe was open and the brief case was lying below the table. Security Inspector, Vishnubhai Trivedi, PW. 6, was conveyed this information, and he called the police and thereafter complaint was given. It is pointed out in the complaint that on 6.5.1989 in the evening four persons, namely: (1). Kiran Bulvantrai Trivedi, (2). Vijay Kashibhai Patel, (3). Vijay Bahadur Shitalprasad and, (4). Ranchodbhai Mulabhai Parmar were in the office and they left the office after locking the same at about 8.45 pm. It was also learnt that the respondent accused, Vijay Bahadur subsequently took the key and entered the office premises stating that some of his personal belongings were lying inside the office. In the security register, there is an entry to the effect that on 8.5.1989 at about 9.45 pm., the accused deposited the key of the office.

2.1 After investigation, the police filed a charge sheet. However, on appreciation of evidence, learned Magistrate came to the conclusion that the accused is not guilty as the prosecution has not proved that the accused committed the offences and that the premises from where the sum of Rs.92,200/- was recovered belonged to the accused. The trial Court doubted the evidence of panch for recovery of the amount from the house of the accused, and hence acquitted the accused.

3. From the judgment it transpires that the trial Court was of the view that evidence of the complainant is not acceptable as the amount stated before the Court is an approximate figure. The trial Court has given undue importance to the fact that security guards did not search the accused and if at all he was going with the currency notes, he could not have gone undetected. The trial Court expressed the view that it is not possible to believe that a person going with stolen money to the tune of Rs.1,20,000/- could have passed through the security gate unnoticed. The trial Court questioned as to why the security guards have not suspected the accused at the time when he was leaving the gate.

4. Panch Yogeshbhai PW. 5 has been examined by the prosecution to prove the panchnama. He has stated on oath that he was called by the police for making search of a house as there was a case of theft of money of electricity Company and the police took him to the house

of the accused where a lady was present and she stated that she is wife of Vijay Bahadur, and thereafter they entered the house. From the amplifier box, the amount was recovered. In the cross examination, he has stated that since six years he is working in the Ahmedabad Electricity Company and he is a Section Officer and he knew the accused. He has stated that at about 2.00 pm. he was not aware that theft is committed in the office of the Company as it was a holiday. He has further stated that he had never gone to the house of accused earlier any time. Police stated to him that they have to go to the house of Vijay Bahadur and thereafter he came to know where he resides. The trial Court observed that the evidence of this witness is at variance with the panchnama and the evidence of the police officer. Except two persons, along with the police personnel, none was present, is the version of the witness while police officer has stated that they took a person to act as a panch who was working in the office as an Engineer. The trial Court has expressed its surprise as this witness was not knowing the address of the accused though he knew him earlier, as if a person working in an office is bound to know the address of all the persons working in the office. The trial Court has raised a doubt as the accused was not present at the time, and, therefore also held that the evidence of the panch is doubtful.

5. The evidence of Yogeshbhai PW. 5 discloses that police requested him to accompany and the police stated to him to act as a Panch. With the police party he went to one house at Sursinji chawl where one lady was present who stated that she is the wife of Vijay Bahadur and from the house an amount of Rs.92,200/- came to be recovered and on some of the bundles of currency notes there were stamps of AEC. He was shown the panchnama which he had signed. From the panchnama, it transpires that police searched the house of Vijay Bahadur at Sursinji chawl, near Sabarmati Railway Overbridge; when they reached near the house one lady named Chandravati was present who identified herself as wife of Vijay Bahadur and she stated that the said house is of Vijay Bahadur. In the presence of the lady the house was searched. There was a name plate of the accused on the house. From the amplifier box, the amount of different denomination totalling to Rs.92,200/- came to be recovered and on certain bundles of currency notes, there were stamps of of AEC, Power Service Division. There were also some bundles without the stamp of AEC.

6. The trial Court appears to be of the view that a person who was working as an Engineer with AEC should not

have acted as a panch; Any other person who may not be connected with the AEC ought to have been taken as a Panch. Merely because the panch was serving in the same Company would not make his evidence doubtful. The trial Court has raised a doubt because though the witness has stated that he knew the accused, he was not knowing where the house of the accused is situated, and therefore, the evidence cannot be accepted on the point that the amount was recovered from the house of the accused. When the panch along with the raiding party reached the house of the accused, a lady who was present there disclosed that she is the wife of Vijay Bahadur and she stated that the house is of the accused where nameplate of the accused was also affixed, and therefore, it appears that the police officer thought that no further evidence is required.

7. In the instant case, there is evidence of finger print expert Maheshbhai Dave, PW. 7. His evidence is not challenged in the cross examination and it is clear from his evidence that the finger print which was noticed on the cupboard and the bag (brief case or cash bag) tallied with the finger print of the accused. The finger prints of Vijay Kashibhai and Vijay Bahadur were taken. Out of the prints, the finger print of the accused matched with the finger print found on the articles. No doubt, only one chance print matched with the finger print of the accused. From the record, Exh. 17, it transpires that prints 'A' and 'B' were taken which were noticed on the door of the safe while 'C' and 'D' were taken from the inside of the safe, which were on the flap of the safe lock. Reading the report Exh. 22 read with Exh. 17 it is clear that the prints of the finger of the accused are identical with the prints which were found at mark 'C' viz. inner side of the cup board on the flap door of the safe. A contention is raised before this Court that merely because finger prints are found, it cannot be held that the accused is guilty. it is required to be noted that if the finger prints were found outside the cupboard or on some furniture, the matter would have been different because ordinarily, as he is working in the office, he might have touched the cupboard while doing some work. In the instant case, finger print is noticed inside door of the safe and no explanation is given for the same. However, Mr. Panchal submitted that the explanation is not sought and, therefore, that circumstance should not be taken into consideration for convicting the accused.

8. True, this is a case of circumstantial evidence. Suresh PW. 3 who was working at the relevant as a

Security Guard has been examined by the prosecution. He has deposed that on 6.5.1989 he was on duty at the gate; There was practice of taking signature of the person who was taking keys and depositing keys; Accused, at about 9.45 came with the keys. An entry is made in the register to this effect, vide Exh.6 which is signed by the accused. After 9.45 pm., none came for the keys.

9. Ranchod Bhulabhai Parmar, PW. 2, who was working as a Peon in the office has also been examined by the prosecution. He has deposed that on 6.5.1989, he worked in the office till 8.45 pm.; Along with him, Vishnubhai, Kiranbhai, and Vijaybahadur (accused) were also there. The office was locked by Vijaybahadur and the keys were with him and he must have deposited the keys in the security office. In the cross examination he has stated that on 6.5.1989, all the four left together. However, Vijay Bahadur, the accused, stated that some of his articles were lying in the office and therefore, he took the keys and went back to the office to collect the articles.

10. Evidence of the finger print expert corroborates the version of the prosecution and there is no explanation for the finger marks on the inside lock of the safe, which ought to have been considered in its proper perspective by the trial Court. The finding of the currency notes from the house of the accused is also not explained by the accused and not appreciated by the trial Court.

11. Mr. Panchal, learned advocate stated that in the instant case, no opportunity is given to the accused. He pointed out that the statement is recorded in a perfunctory manner. He further submitted that all the circumstances which are appearing against the accused ought to have put to him. In the statement recorded under section 313 of the Cr. P.C. , a question has been put to him about the knowledge of Yogesh Patel PW. 5, Exh. 13, and he has stated before that the Court that the police took him to his house at Sursinji chawl and accordingly to his evidence, a lady present there informed that she is wife of Vijaybahadur and Vijaybahadur is staying there. Some articles were lying in the room. There was a cupboard and two beds and from the amplifier box, the muddamal currency notes were taken out. To this suggestion, he has stated that it is false and with a view to implicate him, his statement has been recorded. However, he has not stated that it is not his house. With regard to other evidence, vague questions are put, and, therefore, it would be in the interest of

justice to see that proper opportunity is given to the accused to give explanation. Court should put all the circumstances appearing against the accused.

12. In the circumstances, the order of acquittal recorded by Metropolitan Magistrate, Court No. 9, Ahmedabad on 31.1.1991 in Criminal Case No. 1596/89, is quashed and set aside. The Magistrate, after recording the statement of the accused and after giving the accused sufficient opportunity shall pronounce a judgment on merit, without being influenced by what is observed in this judgment. The learned Magistrate shall give priority to this case and shall dispose it of as early as possible, but not later than six months from the date of receipt of the record and proceedings from the High Court. The registry of the High Court shall send the record and proceedings to the trial Court immediately.

13. The appeal stands disposed of accordingly.

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